

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 JEFFREY A. BEARD, SECRETARY, :

4 PENNSYLVANIA DEPARTMENT OF :

5 CORRECTIONS, ET AL., :

6 Petitioners :

7 v. : No. 02-1603

8 GEORGE E. BANKS. :

9 - - - - -X

10 Washington, D.C.

11 Tuesday, February 24, 2004

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 11:24 a.m.

15 APPEARANCES:

16 RONALD EISENBERG, ESQ., Deputy District Attorney;

17 Philadelphia, Pennsylvania; on behalf of the

18 Petitioners.

19 ALBERT J. FLORA, JR., ESQ., First Assistant Public

20 Defender; Wilkes-Barre, Pennsylvania; on behalf of

21 the Respondent.

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

ORAL ARGUMENT OF	PAGE
RONALD EISENBERG, ESQ.	
On behalf of the Petitioners	3
ALBERT J. FLORA, JR., ESQ.	
On behalf of the Respondent	25
REBUTTAL ARGUMENT OF	
RONALD EISENBERG, ESQ.	
On behalf of the Petitioners	42

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(11:24 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
next in No. 02-1603, Jeffrey A. Beard v. George E. Banks.
Mr. Eisenberg.

ORAL ARGUMENT OF RONALD EISENBERG

ON BEHALF OF THE PETITIONERS

MR. EISENBERG: Mr. Chief Justice, and may it
please the Court:

At his trial in 1983, George Banks' team of
three defense lawyers presented 23 mitigation witnesses,
including three forensic psychiatrists, his mother,
brother, and co-workers, a priest, and two nuns. The
trial court instructed the jury that it must consider any
mitigating evidence unless it was unanimous in rejecting
it.

Now Banks claims that Mills v. Maryland, a
ruling of this Court made after the completion of his
direct appeal, entitles him to re-open his death sentence
for the killing of 13 people. In fact, Mills creates a
new distinct rule regulating the manner of conducting a
death penalty hearing that is not applicable retroactively
and that in any case was reasonably applied by the State
courts attempting to interpret it.

The primary issue in this case, though, is

1 whether the Mills rule which prohibits unanimity
2 requirements at the mitigation stage was merely a minor
3 application of existing law dictated by prior precedent or
4 whether it's instead Teague-barred. Mills does cite
5 Lockett v. Ohio for the general proposition that it's
6 beyond dispute that the sentencer, quote/unquote, may not
7 be precluded from considering mitigation.

8 But before Mills, the sentencer, quote/unquote,
9 always referred to the judge or the jury, never to
10 individual jurors. That was a leap made for the first
11 time in Mills. That was new. Even with a unanimity
12 charge, although there wasn't one in this case, as we'll
13 address, a jury still considered the evidence in the
14 manner that juries historically have considered evidence,
15 that is collaboratively. Until Mills, the Constitution
16 had never been read to forbid unanimity as to verdicts,
17 whether general verdicts or special verdicts. And even
18 since Mills, as this Court recently said in Jones v.
19 United States, we have long been of the view that the very
20 object of the jury system is to secure unanimity by a
21 comparison of views and by arguments among the jurors
22 themselves.

23 So the question of jury unanimity, we believe,
24 remained open not only after Lockett but even within the
25 understanding of members of this Court at the time of

1 Mills and thereafter. In fact, in McKoy v. North
2 Carolina, decided 2 years after Mills, four Justices of
3 the Court rejected Lockett as supporting, let alone
4 compelling, a rule against jury unanimity.

5 Now, whether the dissenters in McKoy can be said
6 to be right or wrong about the meaning of Mills is
7 irrelevant in this Teague context. The question is that
8 they believed that Mills, not to mention Lockett, did not
9 resolve the unanimity question presented here.

10 QUESTION: Mr. Eisenberg, tell -- tell us
11 exactly what you mean by jury unanimity because, you know,
12 most States require jury unanimity in the -- in the final
13 verdict.

14 MR. EISENBERG: Excuse me, Your Honor, yes. I
15 mean only at the stage of finding whether particular
16 mitigating circumstances are present. That is the -- the
17 jury unanimity question that was decided in the Mills and
18 McKoy cases, as I've said, subject to dispute, strong
19 dispute, among the Court that continued even after Mills.

20 Because this is a Teague case, the question, as
21 I've said, is not whether Mills was right or McKoy was
22 right or which side can be better defended now, but
23 whether State court judges reasonably could have known
24 what the outcome would be. And since even within the
25 Court there was such continuing controversy on the matter,

1 it cannot be said that State judges reasonably could have
2 known, and therefore the case is Teague-barred.

3 But that uncertainty continued even beyond McKoy
4 because in the next similar case before the Court, Walton
5 v. Arizona, the issue was presented on essentially the
6 same basis as the Mills case had been. The single hold-
7 out juror scenario, that a single juror because of a
8 unanimity requirement in Mills or because, in Walton, a
9 preponderance of the evidence standard, could block
10 consideration of mitigating evidence and thereby mandate a
11 death penalty case.

12 QUESTION: On -- on the instructions in the red
13 brief at page 8 and then at page 9, there are two
14 different instructions set out. This is in the
15 respondent's brief. And then the jury form which has to
16 be checked is set out on pages 9 and 10. In your view is
17 that all we should consider when we interpret these
18 instructions, or do you have some additional instructions
19 that you wish us to refer to?

20 MR. EISENBERG: Your Honor, I think that the
21 instruction here was basically the same throughout, that
22 the message as to unanimity regarding mitigation or not
23 was basically the same throughout the instructions. It's
24 in the joint appendix at page 21. It's repeated at page
25 26, and we think embodied in the jury form -- I'm sorry --

1 also at pages 66 and 67.

2 And in each of those cases, the jury was
3 instructed first that it must be unanimous to find
4 aggravation or no mitigation and then that it must
5 unanimously find whether any -- find aggravating
6 circumstances which outweigh any mitigating circumstances.

7 But, of course, the threshold question is
8 whether the State courts could even have known that there
9 was such a thing as a rule against unanimity, whether or
10 not unanimity was actually required on the facts of this
11 case. And the Walton case, as I've mentioned, is relevant
12 to that question because in Walton the same argument was
13 at issue, and the argument was that because of the
14 preponderance of the evidence standard, a hold-out juror
15 or even really 12 hold-out jurors, so to speak, could be
16 somewhat persuaded by mitigating evidence, could think it
17 significant, but not quite past the tipping point required
18 by the preponderance standard and yet be precluded from
19 considering that evidence at all in the weighing stage.
20 And yet, the defendant lost that argument in Walton.

21 And again, the relevance for Teague purposes is
22 to leave the State courts in the position of trying to
23 determine before Walton, before McKoy, before Mills, in
24 this case in 1983 that the Eighth Amendment through the
25 Lockett case somehow precluded the establishment of

1 unanimity.

2 QUESTION: Well, with Lockett -- with Lockett
3 they -- what Lockett says is that the sentencer cannot be
4 precluded from considering as a mitigating factor any
5 aspect of the defendant's character or record or any
6 circumstance.

7 Now, one thing that could have meant -- one
8 thing -- is that you cannot execute a person unless 12
9 people think that not only that crime is unusually
10 terrible -- that's aggravating -- but also that it
11 outweighs in this person's life any good things he wants
12 to bring in. That's his character. And 12 people have to
13 come to that ultimate judgment. Now, if that's so, 12
14 people have to come to that ultimate judgment, 12 people
15 have not come to that ultimate judgment when in fact 11
16 would let him off, but one blocks it by saying I don't
17 agree that this is the mitigating circumstance. So if
18 that's what Lockett means, it would be obvious that that
19 wouldn't satisfy it.

20 MR. EISENBERG: Well --

21 QUESTION: Well, what else could Lockett mean is
22 my question.

23 MR. EISENBERG: Lockett -- Lockett --

24 QUESTION: What else could Lockett mean that
25 would make sense in the context of the death penalty? And

1 you'll have a lot of answers, but I want to know what they
2 are.

3 MR. EISENBERG: Excuse me, Justice Breyer.

4 QUESTION: Yes.

5 MR. EISENBERG: It -- what it also could have
6 made sense is that the jury as a whole in the historical
7 manner of juries had to consider the evidence, and there's
8 no doubt that it could have meant the interpretation that
9 you suggest. And we know that because Mills held that and
10 McKoy held that. So, of course, it could have meant that.
11 But the fact that it could have meant that and was
12 eventually held to mean that over continuing dissent by
13 the Court is not -- does not resolve the Teague question.

14 QUESTION: No, it doesn't, but I want you to
15 tell me precisely in a reasonable way -- and I'm going to
16 wonder if that's -- if it is reasonable or not. That's
17 going to be the issue -- what other thing it might have
18 meant. And I -- I'll draw here on the concurrence in
19 Penry where the statement is made it's obvious it's meant
20 what I just said it meant because anything else would have
21 been arbitrary in the context of our arbitrariness
22 jurisprudence.

23 MR. EISENBERG: Well --

24 QUESTION: So -- so you tell me -- I understand
25 the words, well, historical, et cetera, but I want to pin

1 you down more than that.

2 MR. EISENBERG: Yes, Your Honor. Let me speak
3 first to Penry.

4 Penry did not involve this question of
5 unanimity, and the reason I believe that the opinion was
6 taken that it was obviously an application of Lockett is
7 because it involved very much the same kind of categorical
8 question that was presented in Lockett. In the Penry
9 case, there were three questions before the jury, three
10 mitigating categories given to the jury. The defendant
11 said, I have some evidence that doesn't strictly fall
12 within one of those three categories. In Lockett, there
13 were three categories of mitigation given to the
14 sentencer, and the defendant said, I have some categories
15 of mitigation that don't fall within those three
16 categories that my sentencer was limited to. That's why
17 Penry is a straightforward Lockett case.

18 QUESTION: But I'm thinking of Penry's
19 commentary about Mills or whatever. I may -- I may get
20 these cases mixed up, but I thought that Mills was
21 characterized as a case that follows obviously --

22 MR. EISENBERG: Your Honor, I --

23 QUESTION: -- from Lockett --

24 MR. EISENBERG: I could be wrong, but I -- I
25 remember no such statement from any of the opinions in

1 Penry or really in any other case except for the -- the
2 Mills and McKoy cases where the subject was in dispute.
3 So that to the extent it was obvious to some members of
4 the Court, it was far from obvious to other members of the
5 Court, and therefore certainly couldn't have been obvious
6 to the State court judges who were expected to know before
7 either of those cases were decided.

8 QUESTION: Mr. Eisenberg, the court of appeals
9 has changed its mind in this area, has it not?

10 MR. EISENBERG: That is certainly our view, Your
11 Honor, and that is very relevant to the second question
12 presented here, which is whether, even assuming that the
13 Mills rule could be applied retroactively, there was a --
14 an unreasonable application of that rule by the State
15 court.

16 Now, originally this question came before the
17 Third Circuit Court of Appeals in 1991 in the Zettlemoyer
18 case. It was the same type of instruction that's
19 presented here that tracked the structure of the
20 Pennsylvania sentencing statute. And the court of
21 appeals, the Third Circuit Court of Appeals, said that
22 that instruction was not inconsistent with Mills, and it
23 said it was not inconsistent with Mills because an
24 instruction that requires unanimity as to aggravation but
25 doesn't mention unanimity as to mitigation is not an

1 instruction that requires unanimity as to both. It's the
2 same theory that we have been presenting in this case all
3 along.

4 In the next case that came up before the Third
5 Circuit in 1997 in Frey, the Third Circuit held, no, that
6 kind of instruction, with all the words and proximities at
7 issue there, did violate Mills.

8 QUESTION: Did it -- did it treat the Frey case
9 as overruling its earlier case?

10 MR. EISENBERG: It's -- it treated it as
11 distinguishing, Your Honor, but that -- Mr. Chief Justice,
12 but we think that that's irrelevant for our purposes
13 because the Frey case was a pre-AEDPA case, certainly
14 wasn't applying a deference standard. And the Frey case
15 not only wasn't applying the deference standard, but went
16 so far as to characterize the State court's interpretation
17 of its instruction in these capital cases as plausible.

18 Now, whether or not plausible means
19 reasonable --

20 QUESTION: Could I interrupt?

21 MR. EISENBERG: Excuse me.

22 QUESTION: May I interrupt with just one
23 question? Because I'm -- I'm a little rusty on just what
24 the sequence of opinions was. And I -- I think you have
25 one impression of the case if you just read the

1 instructions because I think you've got a very strong
2 argument on the instructions.

3 I get a different impression of the case when I
4 look at the jury form, the verdict form, which in effect
5 requires a check to show the jury acting unanimously. And
6 my question is at the first go-round, did the court of
7 appeals actually focus on the -- the jury form as well as
8 the instructions?

9 MR. EISENBERG: The court of appeals in the
10 Zettlemoyer case, the first one in 1991, focused on both,
11 Your Honor.

12 QUESTION: It did.

13 MR. EISENBERG: And the court of appeals -- it
14 was faced with the -- the -- I believe that the page
15 exactly is 923 F.2d at 308. It's cited in our -- in our
16 brief. The court of appeals specifically quoted both the
17 charge and the verdict form, and we would suggest that
18 both were legally parallel to the charge and the form
19 involved in this case. And the court made its comment in
20 regard to both of those provisions.

21 QUESTION: Because the jury form does seem to
22 imply a concept of unanimity because they got to require
23 -- you know, the form definitely refers to unanimity.

24 MR. EISENBERG: Well, the form refers to
25 unanimity in exactly the same way that the charge does, I

1 would submit, Justice Stevens, because it says, we, the
2 jury, unanimously sentence the defendant in the above
3 matter, and then you have two options, just as the statute
4 in Pennsylvania and just as the judge's charge laid out.
5 We unanimously sentence the defendant in the above matter,
6 and it says to at least -- we -- we, the jury, unanimously
7 sentence the defendant in the above matter to death or
8 life imprisonment. We, the jury -- have you found
9 unanimously, and then the two options. At least one
10 aggravating circumstance and no mitigating circumstance or
11 -- and there's a big or in the middle of the verdict form
12 -- or one or more aggravating circumstances which outweigh
13 any mitigating circumstances. So --

14 QUESTION: Yes, but -- but the key point is that
15 in the mitigating circumstances are, there are one, two,
16 three options. They just checked one.

17 MR. EISENBERG: Yes, Your Honor. There are
18 blanks next to the mitigating circumstances, but frankly,
19 we still have those blanks next to mitigating
20 circumstances now after Mills, after it's been changed, in
21 order to make it perfectly explicit that any one juror can
22 vote for mitigation.

23 QUESTION: And see, it isn't explicit here, and
24 the check seems to me to indicate that they were unanimous
25 on mitigating circumstance number 1, but they were not on

1 the others.

2 MR. EISENBERG: Well --

3 QUESTION: And so it seems very likely that some
4 of the jurors may have considered -- felt they could not
5 consider mitigating circumstance 2 or 3.

6 MR. EISENBERG: Your Honor, two things. First
7 of all, the reason that there are checks there is that the
8 jury, under the Pennsylvania structure, is essentially
9 required to give a second look at mitigation in the
10 weighing charge, even if some of those jurors may have --
11 even if the jurors may have been in dispute about the
12 existence of those mitigating circumstances. So in order
13 to apply the first phase of the instructions, they have to
14 decide whether all of them find no mitigation. If all of
15 them don't find the absence of mitigation, then they go to
16 the second stage, and at that point, they are all required
17 to look at mitigation, even if they might have voted
18 against it the first time. So the statute appropriately
19 tracks the kind of mitigation that all of them are
20 required to consider in the weighing process.

21 The second point I want to make, however, Your
22 Honor, is that, of course, this is not the first time that
23 a verdict form like this and an instruction like this have
24 been looked at. And I must emphasize this is a deference
25 case under section 2254.

1 As I explained, the Third Circuit in 1991 looked
2 at a verdict form like this and said, no, this is not a
3 violation of Mills. Other circuits around the United
4 States have consistently held that this kind of
5 instruction and verdict form are not a violation of Mills.
6 Where the -- where the instruction and verdict form
7 explicitly require unanimity as to aggravation but don't
8 explicitly require unanimity as to mitigation, then
9 there's no violation of Mills. And that's --

10 QUESTION: And so -- so if in fact we have 12
11 jurors and all 12 believe that this person was awarded the
12 Congressional Medal of Honor and 11 of them think that
13 means he shouldn't get death, but one of them thinks it
14 isn't that much of an offsetting factor, on your reading
15 of this, the -- they could conclude after Lockett that
16 it's death because we don't have unanimity on whether that
17 Congressional Medal offsets the horrible crime.

18 MR. EISENBERG: Justice Breyer, for purposes of
19 the second question here, the deference question, our
20 argument is that that is not the case, that the jury here
21 was not permitted to vote for death or not required to
22 vote for death automatically merely because they were not
23 unanimous in failing to find a particular piece of
24 mitigation.

25 QUESTION: So if they had been -- because let's

1 -- I -- I was reading the jury form differently, and I
2 might be wrong. I'll go back to that.

3 But take my hypothetical and I want to go back
4 to the retroactivity question. And on that, you're
5 thinking, well, before Mills a State that came to that
6 conclusion would not be violating the Constitution.

7 MR. EISENBERG: What I would say, Your Honor, is
8 that before Mills a State that came to that conclusion
9 would not have acted unreasonably for purposes of the
10 Teague standard.

11 QUESTION: Yes, all right.

12 Now, suppose in Mills -- suppose you're right.
13 And now in Mills you would say, well, that's not right,
14 and the reason that's not right is because the role of the
15 juror is not simply to find the facts, but also to weigh
16 the significance of the mitigating fact against the horror
17 of the crime. That's what Mills then on that view would
18 have said.

19 Well, why isn't that terribly important? I.e.,
20 that is a radical shift in the role of the juror from what
21 was previously viewed as simply finding facts, now to a
22 person who is going to make the ultimate weighing question
23 in his own mind in respect to life and death and the
24 person's career.

25 MR. EISENBERG: Well, Your Honor, we think it is

1 a significant change and that's --

2 QUESTION: But amazingly enough to fall within
3 in -- you see where I'm going?

4 MR. EISENBERG: Well, that's --

5 QUESTION: I'm -- I'm saying --

6 MR. EISENBERG: -- to the same exception.

7 QUESTION: -- a watershed rule. Is it a
8 watershed rule?

9 MR. EISENBERG: Yes, yes. Yes, Your Honor, and
10 the answer to that is --

11 QUESTION: If it is a watershed rule, then of
12 course it's retroactive.

13 MR. EISENBERG: Then answer to that is, Your
14 Honor, that the fact that a rule is new enough to be
15 Teague-barred is hardly enough to make it -- render it --

16 QUESTION: In other words, it's not that --

17 MR. EISENBERG: -- a second Teague exception.

18 In fact, Your Honor, this Court has on numerous occasions
19 held that rules, including Lockett-based rules, are not
20 new, and yet not a single one of them has been held to be
21 a second exception. The Court has made clear that that
22 category is exceedingly narrow, that such exceptions will
23 be very rare, and surely in every other case where a -- an
24 important Lockett-based rule has been announced that has
25 been found new for Teague purposes, the Court has gone on

1 to reject second exception status here. In fact, even
2 Banks in his brief here does not argue second exception
3 status for the Mills rule.

4 In further comment on the Mills rule, however, I
5 would -- I would like to -- on the Teague bar, Your Honor,
6 I would like to point out, as I've mentioned, that the
7 Court has previously considered Lockett-based claims for
8 Teague purposes. In Simmons, for example, and in the
9 Caldwell case, the Court established rules that were
10 explicitly based on Lockett concerning -- concerning the
11 jury's consideration of evidence at the -- at a capital
12 sentencing hearing. And yet, in both of those cases, even
13 though I would suggest they were really smaller leaps from
14 Lockett than Mills was, the Court has held that those were
15 new rules that were not entitled either to old rule status
16 or to second exception status. And as in the cases
17 holding that Simmons and Caldwell were new rules, we
18 believe the Court should hold that Teague is a new rule.

19 Now, to return to the question -- to the
20 deference question, which --

21 QUESTION: You mean that Teague is a new rule.

22 MR. EISENBERG: I'm sorry, Your Honor. That's
23 Mills is a new rule.

24 QUESTION: Mills is.

25 MR. EISENBERG: Thank you.

1 To return to the deference question, the second
2 question presented, as I was saying, the Third Circuit
3 held that the State court's interpretation, the one that
4 was victorious here in State court, the same
5 interpretation based on the same State court precedents,
6 was plausible. And whether or not plausible means
7 reasonable, it surely does not mean unreasonable.

8 And yet, in the first post-AEDPA case involving
9 Mills that came along in the Third Circuit, this one, the
10 Third Circuit held without discussion of either its
11 original 1991 ruling that had upheld this charge or any
12 discussion of its 1997 ruling that had noted that the
13 contrary construction was not unreasonable, the Third
14 Circuit held in this case that no court could reasonably
15 have applied Mills in the way that the State court did.

16 And the -- the reason that all the other
17 circuits have disagreed with the Third Circuit on that and
18 that the Third Circuit itself has come to a different
19 position on that gets back to Mills itself because Mills
20 was not the kind of charge that was involved in this case.
21 In Mills, the charge explicitly required the jury to be
22 unanimous in order to find the presence of mitigation.

23 QUESTION: Just to get back a minute, Mr.
24 Eisenberg, this case was decided before Mills was decided.
25 Right?

1 MR. EISENBERG: The direct appeal in this
2 case --

3 QUESTION: Yes, the direct appeal.

4 MR. EISENBERG: -- was completed, including
5 denial of certiorari by this Court, before Mills was
6 decided. Yes, Your Honor.

7 And in the Mills case, the Court was faced with
8 a verdict form which explicitly required unanimity to find
9 -- to mark yes for mitigation and explicitly required that
10 only those mitigating circumstances marked yes -- that is,
11 unanimously marked yes -- could be considered at the
12 weighing stage.

13 Now, contrast that in both respects with what
14 happened here. There was no instruction on unanimity for
15 yeses. There was no instruction that only unanimous yeses
16 could be weighed. Instead, we have only an instruction
17 requiring unanimity for no votes on mitigation.

18 And I think that there's a further important
19 point about the Mills case.

20 QUESTION: But, Mr. Eisenberg, you would concede
21 that those -- those questions are -- are certainly
22 ambiguous. The -- Pennsylvania made the change just to
23 clarify that it was the individual juror and not the --
24 the group. You can look at those and conclude that just
25 like you had to find the aggravated unanimously, so you

1 had to find each mitigating unanimously. The form is
2 certainly susceptible to that reading.

3 MR. EISENBERG: Well, Your Honor, I would
4 suggest that if it is susceptible to such a reading at
5 all, it is far from the primary meaning, and the reason
6 for that is really just the rules of English grammar. The
7 two stages of the process that are laid out in the
8 instruction in question are not parallel. They are
9 dramatically different. So the first stage says, you must
10 be unanimous in finding aggravating circumstances or no
11 mitigating circumstances. And there's no question, as a
12 matter of grammar, that there's only one verb in that
13 sentence with two objects, aggravating circumstances and
14 no mitigating circumstances. The verb, 'unanimously finds,
15 must apply to both nouns.

16 In the second sentence, we have a different
17 structure. Unanimously find --

18 QUESTION: Mr. Eisenberg, if you -- if you were
19 -- if you were a -- a defense lawyer and you knew that the
20 -- the law was that each juror could individually decide
21 the mitigators and you were confronted with a form like
22 this, would you object?

23 MR. EISENBERG: Well, Your Honor, had the Mills
24 rule already been decided, I think somebody might have
25 raised an objection. It may or may not have succeeded but

1 certainly had an objection been able to be made
2 contemporaneously, we wouldn't have to have worried about
3 error being built into the trial and the matter could have
4 been handled expeditiously.

5 That's why we have changed our verdict form, not
6 because Pennsylvania has changed its understanding of what
7 has always been the structure of its sentencing process,
8 but because once Mills was decided, once the matter was
9 constitutionalized, it became certainly wise for the court
10 to attempt to avoid further litigation on the question by
11 making it explicit.

12 QUESTION: Before it was just the law and not
13 constitutional, it was all right to be -- to be ambiguous,
14 but once it was constitutional, it had to be clear? I'm
15 not following.

16 MR. EISENBERG: Well, our -- our argument, Your
17 Honor, is that the fact that they changed the form in
18 response to a new rule is not evidence that they
19 previously read their statute in a different way. In
20 fact, the State supreme court has always said that it has
21 always read the statute to require unanimity only as to
22 the absence, to the rejection of mitigation and not to the
23 finding of any particular mitigation.

24 But in reference to your question concerning
25 arguments of counsel, in fact, there was no argument of

1 counsel from either side here that the jury had to be
2 unanimous about mitigation. In the same manner that Your
3 Honor has suggested, presumably the prosecutor, had he
4 believed that the jury had to be unanimous about
5 mitigation, it would have been to his advantage to say so
6 and to argue to the jury, all 12 of you have to find these
7 before you can consider them. He didn't say anything like
8 that.

9 And in fact, here's what the defense lawyer said
10 in volume 6 of the trial transcript at pages 2300 and
11 2301. He wasn't, I believe, specifically referring to
12 mitigation, but he said, quote, think individually, decide
13 this individually. All it takes is one person to save his
14 life.

15 Now, in light of the manner in which the case
16 was argued to the jury and in light of the manner in which
17 the judge presented the charge and laid out the verdict
18 form, we believe that the jury would not have -- cannot be
19 assumed to have come to the wrong conclusion here, and
20 surely that the State court and, as I've mentioned, every
21 Federal circuit court looking at similar instructions and
22 verdict forms, could not be said to have acted
23 unreasonably in finding the absence of a Mills violation.

24 Thank you. If there are no further questions,
25 now I'd like to reserve the remainder of my time.

1 QUESTION: Very well, Mr. Eisenberg.

2 Mr. Flora, we'll hear from you.

3 ORAL ARGUMENT OF ALBERT J. FLORA, JR.

4 ON BEHALF OF THE RESPONDENT

5 MR. FLORA: Mr. Chief Justice, may it please the
6 Court:

7 Lockett and Eddings established a fundamental
8 principle which basically provides that a State which
9 creates any barrier which precludes a sentencer from
10 giving full consideration and full effect to mitigating
11 evidence relating to a person's character, background, and
12 circumstances of the offense is constitutionally
13 impermissible.

14 When we look at Mills and take into account the
15 decision in McKoy, the unanimity instruction in Mills, in
16 a weighing State such as Pennsylvania, essentially was a
17 different type of barrier which precluded jurors to give
18 effect to mitigating evidence. In a non-weighing State,
19 the unanimity requirement would probably be appropriate,
20 but in a weighing State, what happens is a single juror
21 can say to other 11 jurors, I don't believe that this
22 particular piece of evidence satisfies a mitigating
23 circumstance, and that single juror can preclude those
24 other 11 jurors from giving effect.

25 QUESTION: That might have been, Mr. -- Mr.

1 Flora, the logical extension of Lockett, but to say that
2 Lockett itself compelled or directed that extension I
3 think is quite a stretch.

4 MR. FLORA: Justice Ginsburg, I think when you
5 look back at the legal landscape over a period of time,
6 going back from Hitchcock, to Skipper, to Eddings, in all
7 of those cases, the Court dealt with different types of
8 barriers. The Court dealt with different pieces of
9 factual evidence relating to character and background and
10 circumstances of the offense.

11 When the Lockett rule was initially announced by
12 a plurality of the Court, the Court could not perceive in
13 the future every different type of barrier that may come
14 about, and so what happened over a period of time, when
15 you took the Lockett rule, you were essentially applying
16 it to a variety of factual different situations, and each
17 time the Court would look at a particular barrier, which
18 it had not perceived in the past, and if it precluded a
19 juror or a jury from giving effect to mitigating evidence,
20 it struck down that barrier. And that's where we're
21 coming from here.

22 So when we say that it is a stretch of Lockett,
23 I don't believe so. I think it is a logical consequence
24 of Lockett. I think it is dictated by Lockett and the
25 cases that followed after that.

1 QUESTION: Does it -- does it mean nothing that
2 this Court was so sharply divided and that you really have
3 just an opinion? The lead opinion is labeled opinion of
4 the Court, but Justice White disassociated himself from
5 the reading. He -- he had a much narrower view of the
6 case.

7 MR. FLORA: If we look at Mills and if we look
8 at the dissent, in looking at the dissent, my
9 interpretation was that the issue was over how a
10 reasonable juror would have interpreted the particular
11 instructions in that case. I did not glean from the
12 dissent that they thought a unanimity requirement would
13 not constitute a barrier to a jury or jurors giving effect
14 to mitigating evidence.

15 If you look at McKoy -- and I think this is a
16 question that Justice Breyer had posed about a case -- in
17 McKoy at 494 U.S. at 438, the Court says in the majority
18 opinion, we reason that allowing a hold-out juror to
19 prevent the other jurors from considering mitigating
20 evidence violated the principle established in Lockett v.
21 Ohio, that a sentencer may not be precluded from giving
22 effect to all mitigating evidence.

23 QUESTION: Yes, but Lockett didn't put it quite
24 that way, did it? I mean, frequently a later decision
25 will kind of characterize an earlier decision in a way

1 that tends to support the later decision.

2 MR. FLORA: That is correct. I -- I would agree
3 to a point. If we look at Lockett, Lockett did not say
4 that an evidentiary ruling which precluded the
5 consideration or giving effect to mitigating evidence was
6 constitutionally prohibited.

7 QUESTION: It said that the -- it said the court
8 had to admit any evidence dealing with the defendant's
9 character.

10 MR. FLORA: That is correct, but what I'm saying
11 is when you look back at Lockett, at the time Lockett was
12 decided, I don't think the Court could -- could envision
13 the various types of barriers that a State could create
14 which would preclude a sentencer from giving effect to
15 mitigating evidence. So each time a barrier came up,
16 whether it was in Eddings or Skipper or Hitchcock --

17 QUESTION: But what happened in Lockett was
18 quite different than what was involved in Mills. In
19 Lockett, evidence was offered to be considered by the
20 jury. The court said, no, that's not what we think of as
21 mitigating evidence. And our Court said, any evidence
22 bearing on the defendant's character is admissible for
23 consideration by the jury. Now, that's a long step from
24 the way you describe Mills.

25 MR. FLORA: The way I describe Mills is

1 essentially again that in order to give effect to
2 mitigating evidence, you simply cannot have a requirement
3 which allows one juror to preclude the other 11 from
4 giving that effect. And it's my position that that is --
5 that concept is dictated by the Lockett rule.

6 QUESTION: If there's doubt about that, I mean,
7 one might say you would prevail on that argument in a
8 debate, but Teague requires more, doesn't it?

9 MR. FLORA: There is language as to whether if
10 there is a reasonable debate amongst the minds of the
11 jurors. The problem with that concept, when you look at
12 the history of capital jurisprudence since Furman on
13 forward, I can only think of probably two cases in which
14 this Court has been unanimous in its decision, one of
15 which was *Hitchcock v. Dugger*. If we say that the rule
16 upon which a defendant seeks to rely is a new rule, if so
17 much as one Justice disagrees, I don't think we could ever
18 have then a rule that would be based on precedents.
19 That's the problem I have.

20 QUESTION: Does it make any difference if it's
21 four Justices, as it was in *McKoy*, do you think?

22 MR. FLORA: I don't think you can honestly
23 quantitate it -- put a quantitative amount to it. I just
24 think that --

25 QUESTION: Does it make any difference that the

1 dissenters say Lockett didn't remotely support the rule
2 that a mitigator found by only one juror controls?

3 MR. FLORA: I think -- that's a tough question.

4 QUESTION: But that is what -- what was said in
5 McKoy by the dissenters.

6 MR. FLORA: That is what was said in McKoy by
7 the dissenters, but the majority in McKoy disagreed with
8 that.

9 QUESTION: Would it be all right, let's say
10 today after Mills, for a trial judge to instruct a jury,
11 ladies and gentlemen of the jury, this is a case of utmost
12 gravity from the standpoint of both the defendant and --
13 and the families of the victims? And your verdict will be
14 most valuable if you are unanimous as to mitigating and
15 aggravating factors. You should not surrender your
16 individual views. If you cannot come to that conclusion,
17 then I'll give you further instructions. Could a judge
18 say that? Would that serve a purpose?

19 MR. FLORA: A judge could not say in light of
20 Mills. I think, however --

21 QUESTION: It's too dangerous?

22 MR. FLORA: -- especially in a weighing State
23 because you're talking about unanimously find aggravating
24 circumstances. Then you also used the phrase unanimously
25 find mitigating circumstances, and that's the problem that

1 I have.

2 I think clearly a court can give guidance to a
3 jury in the consideration and weighing of evidence, and
4 quite frankly, that happens all the time.

5 QUESTION: Because it seems to me that what I've
6 said is right, that if they are unanimous on all factors,
7 that that's -- that's the jury functioning at its best.
8 And you would give further instructions in the event that
9 the jurors cannot surrender -- should not surrender their
10 individual views on mitigation, and if that's the way it
11 has to come out, fine. But I want you to try to do this.
12 You think that would be error?

13 MR. FLORA: If you tell the jury to try to
14 unanimously find all of the mitigating factors, the
15 problem I see with that is what happens if they don't. In
16 Pennsylvania there is no remedy if there is a deadlock on
17 the finding of a mitigating factor.

18 QUESTION: Well, of course, my hypothetical was
19 half -- half completed, and then we'd have to fill in what
20 would happen and I -- I didn't bother to do that. But it
21 does seem to me that the instruction I suggest in the
22 first instance is -- is valuable and also reflects the
23 understanding at least pre-Mills that -- that many people
24 in the legal system had as to the way the jury functions.

25 MR. FLORA: It was an understanding of the way

1 the jury functions pre-Mills. I would agree there, but in
2 the penalty phase, in taking a look at the way the
3 unanimity requirement would operate in that phase, it is
4 very different --

5 QUESTION: Well, I -- I think for your case you
6 -- you have to amend your statement. If you say this was
7 the general understanding as to the way the jury functions
8 pre-Mills, I think you should say pre-Lockett or -- or
9 you're in danger of losing your Teague argument.

10 MR. FLORA: Well, when I think of a unanimity
11 requirement in a non-capital setting, if one juror holds
12 out, that juror cannot force a guilty verdict. In a
13 capital case, if one juror holds out and precludes the
14 other 11 from giving effect to mitigating evidence, that
15 one juror essentially can effect a sentence of death.

16 QUESTION: That's true, but now what are you --
17 what do you say to a different reading of Lockett, which
18 would be the following? A State official reads Lockett
19 and says, this is how it's supposed to work, that the
20 defendant can introduce evidence on anything he wants and
21 the jurors can consider any of this mitigating evidence,
22 and they do consider it. But when it comes time to vote,
23 the only things that the jurors can use to offset the
24 aggravating factors are mitigating aspects of the
25 defendant's life, that they unanimously agree are, one, in

1 existence and, two, are mitigating. They look at Lockett
2 and say, of course, the jurors considered everything. Now
3 -- now it comes time to vote, and at this point these are
4 the rules in our State.

5 Now, what I think is the hardest for you is,
6 while that might not be the best reading of Lockett and it
7 certainly doesn't prove to have been the true reading of
8 Lockett after Mills, can we say it's an unreasonable
9 reading of Lockett?

10 MR. FLORA: I think we can.

11 QUESTION: Because?

12 MR. FLORA: I think we can because merely giving
13 consideration to mitigating evidence would, I think, also
14 necessitate the ability to give effect to that evidence,
15 and I think that's what's essential. If we're left with
16 the fact --

17 QUESTION: But you -- you don't seem to mention
18 our holding in Saffle v. Parks which was a much harder,
19 closer case in my view about whether it was dictated by
20 Lockett than your case. And the Court said no. And in
21 light of Saffle, I -- I don't see what you have left going
22 for you on that argument.

23 MR. FLORA: In Saffle, you were dealing with an
24 anti-sympathy instruction. Sympathy in and of itself is a
25 concept, but it's not evidence of character. It's not

1 evidence of background. It's not evidence of the
2 circumstances of a crime.

3 QUESTION: Sympathy is a -- a conflict?

4 MR. FLORA: Is a concept.

5 QUESTION: Concept.

6 QUESTION: Oh, concept. Excuse me.

7 MR. FLORA: When you introduce sympathy, as the
8 attempt was to be done in Saffle, that by doing that
9 you're bringing into the picture something that is totally
10 irrelevant and from which a jury would not be able to make
11 a reasoned moral inquiry into the culpability of the
12 defendant to determine whether a sentence of death or life
13 should be imposed. So when I look at Saffle and I look at
14 what Saffle was attempting to do, I think that's very
15 different than having a barrier which precludes giving
16 effect to character evidence and background evidence and
17 evidence specifically relating to the circumstances of an
18 offense. I see it as being very different under the
19 circumstances.

20 QUESTION: Is -- is -- the point I was thinking
21 before and I'd -- it was Justice Kennedy actually. I
22 think when he -- he wrote in concurrence. It is apparent
23 the result in Mills fits within our line of cases
24 forbidding the imposition of capital punishment on the
25 basis of caprice in an arbitrary and unpredictable fashion

1 or through arbitrary or freakish means. That's Franklin
2 and California v. Brown and Furman and so forth.

3 All right. Think back to what my -- my effort
4 to characterize a reasonable State interpretation of
5 Lockett different from yours. Well, can you say why would
6 that be in your opinion, the State saying they consider
7 everything? You remember what it was. Right? All right.
8 Why would that be freakish or arbitrary?

9 MR. FLORA: It would be freakish or arbitrary
10 again I think because mere consideration of evidence by a
11 jury is not enough. I think you have to give that
12 evidence effect. Without giving that evidence effect, I
13 think you can end up with an arbitrary imposition of the
14 death penalty.

15 QUESTION: No, but the question is how you give
16 it effect. Eddings and Lockett said you cannot preclude
17 the jury, all 12 people, categorically from giving a
18 certain kind of mitigating evidence any consideration.
19 The question in Mills was can you preclude one juror from
20 giving dispositive effect to an item of evidence in such a
21 way as to determine the verdict. Those are two very
22 different questions. They can be placed under the
23 umbrella of what effect must jurors be allowed to give to
24 mitigating evidence, but they are very different questions
25 within that umbrella. And it seems to me that because the

1 questions are different, there is not something irrational
2 or capricious in someone having a question -- in someone
3 being uncertain of the answer to the second question even
4 though the first question has been answered in favor of
5 admissibility. What do you say to that?

6 MR. FLORA: I think that it still comes back to
7 how the unanimity requirement operates. And the mechanism
8 that's being utilized in employing that unanimity
9 requirement is the actual juror, and if that juror is
10 again I think a lone, hold-out vote, then I think under
11 the circumstances that is a clear violation of the Lockett
12 rule.

13 QUESTION: Is -- a different question. Is the
14 jury form in the record -- do we have it? I'm -- I'm
15 looking at pages 66, 67, and 68 of the appendix where --
16 of the joint appendix where you have the form. And I'm
17 trying to work out whether this is or is not ambiguous.
18 And it seems to me it might depend on the way in which it
19 appeared on the page because you see the word unanimously
20 appears over here in question 2 on page 66, and depending
21 on how this is indented, it might be whether the jury
22 would reasonably think that that word unanimously does or
23 does not apply to the questions that are on page 68.

24 MR. FLORA: It's improperly indented. When you
25 go back and I think you could actually look at the -- at

1 the jury --

2 QUESTION: But the form itself is -- it's
3 indented. If it were indented, it would seem that the
4 unanimously would govern what follows thereafter, but if
5 it's not indented, it seems to me a judge might reasonably
6 think that that word unanimously didn't govern what --
7 what follows thereafter.

8 MR. FLORA: When you have we, the jury, have
9 found unanimously, my recollection of the form was that it
10 is actually not indented like that.

11 QUESTION: If it's not indented, then -- and
12 this is the other part of the case. See, if -- if it's
13 not indented, then you look at the instruction and in the
14 instruction itself, nowhere does the judge say anything
15 about having to find the -- the mitigating factors
16 unanimously. He doesn't say that. And then you look at
17 the jury form and again, if it's not indented, it really
18 doesn't seem to say that they have to find this
19 unanimously because the word unanimously seems to apply
20 here on the page to the first three things that are blank.
21 And then we get a new section. In the new section it
22 doesn't say anything about unanimous.

23 So -- so that was what I want you to reply to
24 because the question is whether a judge in that State
25 court could reasonably have taken this form and the

1 instructions and said, well, it -- it doesn't say they
2 have to be unanimous. They wouldn't have thought they
3 did.

4 MR. FLORA: My understanding of the verdict form
5 when it was developed was that we, the jury, have found
6 unanimously basically applies to all of the check-off
7 items.

8 QUESTION: All of those things.

9 MR. FLORA: I beg your pardon?

10 QUESTION: And -- and if a judge -- if a judge
11 in the State says, well, I think it didn't, what would you
12 point to in reply?

13 MR. FLORA: The only thing that I could point to
14 is the actual verdict form itself. That's all I could
15 point to.

16 I'd like to go back a minute on the -- the
17 question on the jury question -- or the jury instructions.

18 Jury instructions in capital cases to begin with
19 are very difficult to get across to jurors. Just
20 traditionally we've had a tough time. When you look at a
21 case like this and you have the jury going through the
22 guilt phase of the case, that jury is already conditioned
23 to a unanimity requirement in finding guilt. When you
24 then carry them over to a penalty phase and you take the
25 instruction that we have here and you give that

1 instruction to them, given the fact it's the way they've
2 already been conditioned and listening to that instruction
3 and hearing the word unanimously repeated and repeated,
4 there is a substantial likelihood that the jury would
5 interpret that instruction as requiring unanimity both as
6 to the aggravating and mitigating circumstances. And
7 that's the problem with the instruction.

8 And then when you take the verdict slip and put
9 that on top of it, I think that compounds everything under
10 the circumstances. And that's the problem here.

11 When we -- staying with this, when the State
12 supreme court looked at the Mills issue -- and they
13 decided Mills on the merits in 1995. It was not decided
14 during the direct review process. Pennsylvania has a very
15 unique procedure dealing with finality in capital cases.
16 In 1995 when the State supreme court applied Mills on the
17 merits, what they simply did was they said, we interpret
18 our statute as not requiring unanimity. They looked at
19 only a portion of the instruction, I believe approximately
20 three sentences, and they say, the instruction tracks the
21 language of our statute and therefore there is no
22 violation of Mills. I suggest that's an unreasonable
23 application because what they didn't do is apply the
24 correct standard in --

25 QUESTION: But that was something in 1995, and

1 you're talking now about a case that was over on direct
2 appeal before Mills was decided.

3 MR. FLORA: That is correct, but in 1995, when
4 the case was decided, the Pennsylvania supreme court had
5 the benefit of Mills. And that's what's different about
6 this case.

7 Pennsylvania has a very different and unique
8 procedure which essentially leaves open the direct review
9 process because in capital proceedings in Pennsylvania
10 prior to 1996, the State court on collateral review would
11 apply any existing constitutional precedents to a claim,
12 even though it was not considered first on direct review
13 and even though the decision came up or was decided by
14 this Court after the direct review process. It's a very
15 different concept there. So there's a question here as to
16 when finality I think occurred.

17 QUESTION: But wouldn't that undercut this
18 Court's remand the first time around? I mean, if it were
19 -- if it was still on direct review, then there wouldn't
20 be any question about applying Teague and yet we sent it
21 back.

22 MR. FLORA: And I understand that, and when you
23 sent it back, one of the questions we had in our own mind
24 is whether in fact this Court was fully aware of
25 Pennsylvania's unique process dealing with finality in

1 capital cases.

2 In looking at Teague, one of the very first
3 things you have to do is determine when the judgment is
4 final. Teague itself speaks in terms of conventional
5 notions of finality, but that doesn't mean a State can't
6 develop its own concept of finality to which the Federal
7 courts should give respect. After all, States have the
8 primary responsibility for establishing rules of criminal
9 procedure and protecting the rights of an accused.

10 With that in mind, concepts of federalism and
11 comity which underline the basic precepts of Teague are
12 not offended if a State court decides to keep open its
13 direct review process and on collateral review say, look,
14 here's a decision that came down from the United States
15 Supreme Court. We are going to apply it to the facts of
16 this case because we want to be absolutely certain that
17 execution of an individual is beyond constitutional
18 reproach.

19 QUESTION: Yes, but that's the State making a
20 policy that its State court judges will do that, and
21 that's different from a Federal intrusion.

22 MR. FLORA: I think the States have a right to
23 do that.

24 May I finish the question?

25 QUESTION: I think you've answered it, Mr.

1 Flora. Thank you.

2 Mr. Eisenberg, you have 4 minutes remaining.

3 REBUTTAL ARGUMENT OF RONALD EISENBERG

4 ON BEHALF OF THE PETITIONER

5 MR. EISENBERG: Thank you, Mr. Chief Justice.

6 As to the last point concerning finality, Your
7 Honor, and the argument that the -- Pennsylvania has
8 created a unique form of collateral review, which is
9 really just direct review, that would be news to the State
10 supreme court which declared this very case to have become
11 final at the conclusion of direct appeal in 1987.

12 Moreover, the Pennsylvania Supreme Court has on
13 numerous occasions applied the Teague rule in cases
14 arising on collateral review to hold that the claim at
15 issue was a new rule. Obviously they couldn't have done
16 that if they didn't think that their own collateral review
17 occurred after the point of finality.

18 And -- and furthermore, in -- in response to the
19 argument that this Court may not have been fully aware of
20 the supposedly unique nature of Pennsylvania's procedure,
21 Mr. Flora made exactly that argument in the brief in
22 opposition to certiorari that preceded this Court's
23 previous summary disposition in this case.

24 Concerning the general argument that Lockett is
25 not a new rule because it forbids any barrier to the

1 consideration of mitigation, of course the whole question
2 of what's a barrier that qualifies for Lockett protection
3 or not -- and that question has by no means been clear, as
4 I mentioned. That was the exact argument that was at
5 issue in Walton, and the majority of the Court held that
6 to the extent the preponderance standard is a barrier,
7 it's an acceptable barrier. But, of course, even in those
8 cases where the Court has held that Lockett applies, to
9 create a rule against a barrier to consideration such as
10 Simmons and such as Caldwell, the Court has, nonetheless,
11 held that that rule is new.

12 Saffle is certainly additional support for that
13 proposition, although in Saffle the Court declined to
14 create a rule. In Simmons and Caldwell, the Court did
15 find that the rule was required by Lockett, and yet in
16 later cases found that the rule was new.

17 Now, one of the reasons I think that the
18 alternative view or the -- the failure to see Lockett
19 immediately as a case that precluded unanimity is because
20 we must consider what the nature of consideration of
21 mitigating circumstances is, Your Honor. It's not merely
22 a fact finding. It is really a mixed question of law, in
23 fact. The jury is not required to find fact A, fact B, or
24 fact C. It is required to find a mitigating circumstance.

25 And given that that is the nature of mitigating

1 circumstances, it was all the more reasonable for the
2 States not to understand Lockett as precluding unanimity
3 for the purposes of making that mixed fact -- mixed fact
4 and law determination at the mitigating stage. But in any
5 case, as I've said, given the dispute even on this Court,
6 it was certainly reasonable for the -- for the State
7 courts not to know.

8 And given the dispute among the other courts
9 about the -- the nature of the application of the Mills
10 rule to verdict forms and instructions like this one, it
11 was certainly reasonable for the State courts to --

12 QUESTION: See, this mixed question of fact of
13 law that I think makes it more difficult for you in the
14 sense that if it's a mixed question, it's really asking
15 the jurors to decide should this person die, does he
16 deserve to die. And then the pre-Mills statute in the
17 State becomes a situation where he will die even though 11
18 jurors think he shouldn't.

19 MR. EISENBERG: But, Your Honor, those --

20 QUESTION: And that -- that --

21 MR. EISENBERG: -- those difficult mixed
22 questions are exactly the kinds of questions that we
23 always ask juries to decide and in every context outside
24 of this one, to decide unanimously, even for example, not
25 just in the case of the commonwealth meeting its burden of

1 proof, but the defendant meeting his burden of proof where
2 that burden of proof is on him in the situation of a -- of
3 an affirmative defense.

4 Of course, my argument is not that Lockett can't
5 possibly be read to require the result that you suggest.

6 If there are no further questions, thank you.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
8 Eisenberg.

9 The case is submitted.

10 (Whereupon, at 12:24 p.m., the case in the
11 above-entitled matter was submitted.)
12
13
14
15
16
17
18
19
20
21
22
23
24
25